Reno Cab Co., Inc. d/b/a Reno Sparks Cab Co. *and* Reno Cab Drivers Independent Association. Cases 32-CA-3896 and 32-CA-3911

February 14, 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On October 5, 1982, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[1] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Reno Cab Co., Inc. d/b/a Reno Sparks Cab Co., Reno, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We hereby correct the following inadvertent errors in the Administrative Law Judge's Decision:

The word "causally" has been substituted for the word "casually" contained in the footnote quoted in sec. III,A,2, par. 1, of the Decision. Also in sec. III,B,1, par. 5, of the Decision, the Administrative Law Judge stated that Hollister's discharge occurred on July 9, 1981. The correct date, as found elsewhere in the Decision, is August 9, 1981.

[2] Because Respondent's asserted reasons for the discharges were admittedly pretextual, Member Jenkins does not rely on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), which in his view is designed to evaluate the weight of two genuine reasons, one lawful and one unlawful, for a discharge and has no application where the only genuine reason is unlawful.

Member Hunter, in adopting the Administrative Law Judge's finding that Supervisor Perry's comment to employee Reading violated Sec. 8(a)(1) of the Act, does not rely on *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980), for the reasons set forth in his dissent in *Donnelly Manufacturing Co.*, 265 NLRB No. 196 (1982).

Member Hunter also finds inappropriate and does not adopt the Administrative Law Judge's characterization of Respondent's motive in discharging Hollister as "virulent animosity."

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge: This case was heard in Reno, Nevada, on April 27, 1982. The charges in Cases 32-CA-3896 and 32-CA-3911 were filed respectively on September 2 and 8, 1981, by the Reno Cab Drivers Independent Association, herein called the Union. An order consolidating those cases and a complaint issued on October 20, 1981. The complaint, as amended on March 16, 1982, alleges that Reno Cab Co., Inc. d/b/a Reno Sparks Cab Co., herein called Respondent or the Company, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended.

Issues

The primary issues are:

1. Whether the Company unlawfully interrogated and threatened employees concerning union activities and promulgated written work rules because of such activities.

2. Whether the Company unlawfully discharged Jason French and John Hollister because of their union activities.[1]

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Nevada corporation with an office and place of business in Reno, Nevada, is engaged in the business of providing cab services to the general public. During the 12 months immediately preceding the issuance of the complaint, Respondent derived gross revenues in excess of $500,000 from its business operations. During the same period of time, Respondent purchased and received goods or services valued in excess of $5,000 which originated outside of Nevada. The amended complaint alleges, the amended answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The amended complaint alleges, the amended answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] The complaint also alleges that Anthony Castellano was discharged because of his union activities. By motion dated May 21, 1982, counsel for the General Counsel moved to dismiss those portions of the complaint and those portions of the charge in Case 32-CA-3911 that alleged that Castellano was discharged in violation of the Act. The motion stated that Castellano had entered into a non-Board settlement with the Company and that the Charging Party did not object to that settlement. By my order dated May 26, 1982, that motion was granted.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Discharge of French*

1. The sequence of events

The company operates a fleet of taxicabs. On July 6, 1981, the Company hired Jason French as a cabdriver. French had substantial prior experience driving a cab. From 1976 through 1978 he worked on and off as a part-time cabdriver for Yellow Cab in Reno. In April and May 1978 he worked as a part-time cab driver for Whittlesea Cab in Reno. When French applied for work with the Company on July 6, 1981, he filled out and signed the Company's application form for employment. That form required the applicant to list all jobs held in the past 5 years and to account for all periods of unemployment. French listed three jobs covering the period from August 1976 to January 1981, none of which related to his prior work for cab companies. French testified that in his employment interview he told the Company's general manager, Paul Anderson,[2] that he had spent almost 2 years working for Yellow Cab and a couple of months working for Whittlesea Cab. According to French, Anderson told him that the application was simply a formality. French averred that he left the cab driving jobs off the application and only listed the employment that he could fit on the three blanks provided in the application. Anderson, in his testimony, denied that French told him about prior cab-driving experience. The one area of prior employment that a cab company would be most interested in when hiring a new driver would be that driver's work with other cab companies. It is most unlikely that Anderson would have taken the casual attitude toward such prior experience that was attributed to him by French. On that issue I believe that Anderson was a more believable witness than French, and I credit Anderson. I find that French did attempt to mislead the Company with regard to his prior work for cab companies by omitting the description of that work in his application.

French was hired as a probationary employee. The Company considers newly hired employees to be probationary employees for 30 to 60 days and during that time it gives more than usual scrutiny to their work.

George Lemmons was the Company's assistant manager.[3] In the weeks following French's employment, Lemmons received the impression from talking to French that French knew more about the cab business than he would have if he had no prior experience. Lemmons also knew that French's application showed no prior experience as a cabdriver. On July 21, 1981, Lemmons called the Yellow Cab Company and found out that French had worked for that company as a driver. On the same day Lemmons wrote a memo which was shown to Anderson and put in French's file. That memo said: "Mr. French falsified his application. He stated to us that he had never before driven a cab. On checking with a Mr. Drake of Yellow Cab Co., we found that Mr. French had driven for them in 1978." Anderson wrote on the memo: "What's he hiding. Watch carefully if book and attitude do not improve terminate."

As indicated in Anderson's note, the Company was concerned with French's low book. The "book" is the amount on the cabdriver's meter at the end of each shift. Lemmons had spoken to French and told him that he had to get his book up.[4]

For some time before French's hire, cab companies as well as cabdrivers in the Reno area were concerned with a loss of cab business caused by a free shuttle service offered by the MGM Hotel. The MGM had been required to supply that shuttle service by the county building commissioner as a condition to obtaining a license to build a second wing. There was a good deal of talk and some action concerning a boycott of MGM and some cabdrivers believed that the cab companies were not taking a firm enough position. French testified that on July 25, 1981, a number of drivers became annoyed because they had not been listened to and were being blamed for a boycott, and at that point they decided to represent themselves. There is no evidence in the record that French became involved in any protected activity before that time. On the evening of July 26, a number of drivers held a meeting at French's house and they agreed on a so-called drivers' bill of rights. That meeting was the first attempt by the drivers to organize. A notice to all cabdrivers was drafted which indicated that on August 3, 1981, a charter meeting of the Reno Cab Drivers Association would be held to elect officers, formulate bylaws, and decide on contract terms to be presented to the cab companies. The notice was signed by French on behalf of the Association's initiative committee. The bill of rights referred to rates of compensation, sick leave, vacation, and other terms and conditions of employment.

French was scheduled to be on duty for the following morning, July 27, 1981. That morning French called the Company's dispatch office and said that he could not work because he was sick.[5]

At or about 9 a.m. on July 27 French went to the dentist and had a tooth extracted. At or about 11:45 a.m. he went to the Reno airport and attempted to obtain signa-

[2] The Company admits and I find that Anderson was a supervisor and agent of the Company.

[3] The Company admits and I find that at the times material herein Lemmons was a supervisor and agent of the Company.

[4] This finding is based on the credited testimony of Lemmons. French acknowledged in his testimony that he was advised to pick up his book and was told that he was capable of making more money if he really wanted to.

[5] French testified that the previous afternoon, July 26, he had a toothache; he went to the office and told Anderson about the toothache; he gave Anderson a handwritten note asking whether he could switch his day off so that he could have the following day off to go to the dentist; and Anderson agreed that he could have July 27 off. Anderson, in his testimony, denied that he had such a conversation or that he received a note from French on July 26. He averred that the first he heard that French was not working on July 27 was that morning when he learned from the dispatcher that French had called in sick. The Company's dispatch record for July 27, which was in the handwriting of the person answering the phone in the dispatch office, showed that French would not be in. Anderson credibly testified that if he had been given a note by French it would have been in French's personnel file. That personnel file, which was subpoenaed by the General Counsel, did not contain such a note. As indicated by the findings above relating to the employment application, I do not believe that French was a fully candid witness. I do not credit French's assertion that on July 26 he was given permission by Anderson to take off from work on July 27. I do credit Anderson's version of the incident.

tures from cabdrivers on a petition to support the Union. A long line of cabs are generally waiting at the airport to obtain passengers. On that morning French distributed the notice about the Union's charter meeting and the cabdrivers' bill of rights to a number of those cabdrivers.

Sometime on July 27, 1981, Anderson heard a report that French was at the airport passing out literature. At that time he thought French was supposed to be working so he checked with the dispatch office and was told that French had called in sick that morning. At that point Anderson decided to go to the airport to find out why French was there when he was supposed to be out sick. As he was leaving the office the Company's president, Roy L. Street,[6] asked him where he was going and Anderson explained the situation to him. Street decided go along. Anderson testified that while he was riding to the airport with Street, Street asked him what kind of a driver French was and he responded by saying that he had already made a decision to terminate French because of French's false application and because French had called in sick and then went to the airport to do something that he normally would not do if he were sick. I am unable to credit that testimony. Street and Anderson were the highest echelon of management in the Company. It is difficult to believe that they would have wasted their time by jointly driving to the airport simply because of curiosity. They had no reason to be concerned with what French was doing at the airport if the decision had already been made to fire French. They did not go to the airport to tell French that he was discharged. Anderson testified that he had no intention of firing French at the airport. Anderson's testimony with regard to his conversation with Street was simply not believable.

Anderson also acknowledged in his testimony that the Company made decisions with regard to the discharge of employees on an individual basis in which a number of factors were considered and, in substance, that there was no fixed company policy with regard to discharge for a violation of rules.

When Anderson and Street arrived at the airport, Street walked to where French was handing out literature and spoke to French. Anderson stopped for a moment to talk to another driver, Joe Reading, and then joined Street and French. Reading was about 10 feet away and he overheard most of the conversation. French, Anderson, and Reading testified concerning what was said. Street did not take the witness stand.[7]

French's testimony concerning this incident was quite confused and difficult to follow. He set forth details of the conversation on direct examination, cross-examination, and examination by the Administrative Law Judge, and on each occasion new or different material was added. When all of his testimony was added together, the following version of the incident appeared: Street looked at the literature that French was handing out and said that it was a bunch of garbage, that he (Street) was doing a good job for his men , that he did not need people like French, and that French was a troublemaker. Street asked why French was doing that and why he had not come to him. At that point two or three other cabdrivers entered the conversation. One of those drivers was Bill Cooksey. Cooksey said that Street was not giving his men anything, that French was out there trying to do something for the men, and that it looked as if French was going to get fired for it. French then asked whether that meant he was being terminated. Street replied, "Yes, you can't talk to me like a man. You're out." Later in the conversation French once again asked whether he was terminated and Street replied that he did not like French talking behind his back, that French was a troublemaker, that French was out, and that French would never get a job with any other company. At some point in the conversation,[8] Anderson said that they could get him for unexcused absences if they wanted to and that was the reason they were letting him go.

Anderson testified very briefly concerning this conversation. He averred that French accused Street of not "giving a damn" about the drivers and that the next thing he clearly heard was French asking if he was terminated and Street telling him that he was. He testified that French asked why he was being fired and he (Anderson) replied that it was for an inability to fill in an assigned shift. He also averred that he did not specifically hear Street say that French would not talk to him like a man, that there was a lot of shouting going back and forth, and that he did not hear the entire conversation. After listening to Anderson's testimony and observing his demeanor I am of the opinion that he was consciously trying to avoid giving a full description of the incident. He was so lacking in candor that his testimony in this regard was of little value.

Joe Reading is the only witness to this conversation that I am prepared to fully credit.[9] His version was as follows: French and Street spoke about a petition that French was asking people to sign. Street said that his cabdrivers had no need for an organization because he took good care of them. French and Cooksey disagreed with Street and there was discussion about conditions for cab drivers and their pay. Street told French that the reason French did not make a great deal of money was that he took too many breaks and was out of his cab too much. French responded by saying that he worked his full shift and barely got time out for lunch. Street said, "You mean you used to work for me." French asked whether that meant that he was fired and Street replied that it did. Either French or Cooksey asked why and Street said, "Because he won't come and talk to me like a man." About that time Anderson said something about unexcused absences and French, replied that he had a

[6] The Company admits and I find that Street was a supervisor and agent of the Company.

[7] Anderson testified that Street was away on vacation during the hearing.

[8] In his final version French testified that Anderson entered the conversation before Cooksey got into it. It is difficult to follow the sequence because in an earlier version of the conversation, French averred that Cooksey was the first one to speak about discharge.

[9] After that incident Reading became active in the Union and edited the Union's newsletter. He left Respondent's employ in mid-December 1981. Those factors were considered in evaluating the possibility of bias. However, Reading was a very convincing witness and his demeanor on the stand was such as to warrant confidence in his testimony.

doctor's excuse for that day and that he had talked to Anderson about it.

As indicated above, I am unable to credit Anderson's version of the conversation. I am also unable to give credence to French's version. I believe he was less than candid on other matters and that he could not be relied on for an accurate version of this conversation. Reading, however, was a fully credible witness and he corroborated some of the testimony of French. In sum, I find that Street became extremely agitated when he found that French was distributing union literature, that he fired French, and that he explained the discharge by saying that it was because French would not come and talk to him like a man. In the context of the entire conversation, Street's remark about French not coming and talking to him like a man was clearly geared to Street's resentment over French's union activity. It was tantamount to an admission by Street that he was discharging French because of that activity.

2. Analysis and conclusions with regard to the discharge of French

The controlling law is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981),[10] cert. denied 455 U.S. 989 (1982), in which the Board applied the "test of causation" that had been articulated by the United States Supreme Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). In reliance on the Supreme Court decision the Board held, 251 NLRB at 1089:

> Thus, for the reasons set forth above, we shall henceforth employ the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[14]

The threshold question is, therefore, whether the General Counsel has by a preponderance of credible evidence made out a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in French's discharge.

French was engaging in protected union activity when he distributed union literature to fellow employees at the airport on July 27, 1981. Street, the president of the Company, and the man who fired French, obtained knowledge of that activity when he spoke to French and read the literature that French was handing out. Street discharged French on the spot. Street not only mainfested his animus against such activity but in substance admitted that that activity was the reason for the discharge when he told French that French was being fired because he would not come and talk to Street like a man. The General Counsel has made out a strong *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in Respondent's decision to discharge French.

The next question to be considered is whether Respondent has met its burden of demonstrating that French's termination would have taken place even in the absence of his union activity. Respondent has established that French, a recently hired probationary employee, falsified his application for employment by omitting reference to prior jobs with cab companies; that French had a low "book"; and that French called in sick when he was well enough to distribute union literature at the airport. However Anderson admitted in his testimony that he had no intention of discharging French at the airport. None of the reasons asserted by Respondent for the discharge of French are consistent with Street's remark to French that French was being discharged because French did not come and talk to him like a man. That remark established that Street's concern was with the fact that French was seeking union representation rather than dealing individually with Respondent. Evaluating the evidence as a whole, I find that Respondent has not demonstrated that it would have discharged French even in the absence of union activity. Respondent has not produced evidence to balance, much less to outweigh, the evidence produced by the General Counsel. I therefore find that by discharging French, Respondent violated Section 8(a)(3) and (1) of the Act.[11]

[10] While the First Circuit Court of Appeals enforced the Board's order, that court disagreed with the Board with regard to the exact nature of the Employer's burden once the General Counsel had established a *prima facie* case. In the court's language:

> Thus, the employer in a section 8(a)(3) discharge case has no more than the limited duty of producing evidence to balance, not to outweigh, the evidence produced by the general counsel.
>
> The Board may properly provide, therefore, that "Once [a *prima facie* showing] is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." 251 NLRB No. 150, at 20–21 (footnote omitted). The "burden" referred to, however, is a burden of going forward to meet a *prima facie* case, not a burden of persuasion on the ultimate issue of the existence of a violation.

The Third Circuit has expressed its agreement with the First Circuit. *Behring International, Inc.* v. *N.L.R.B.*, 675 F.2d 83 (3d Cir 1982). The Ninth, Eighth, Seventh, Sixth, and Fifth Circuits have indicated their agreement with the Board's position. *Zurn Industries, Inc.* v. *N.L.R.B.*, 680 F.2d 683 (9th Cir. 1982); *N.L.R.B.* v. *Fixtures Manufacturing Corporation*, 669 F.2d 547 (8th Cir. 1982); *Peavey Company* v. *N.L.R.B.*, 648 F.2d 460 (7th Cir. 1981); *N.L.R.B.* v. *Lloyd A. Fry Roofing Company, Inc. of Delaware*, 651 F.2d 442 (6th Cir. 1981); *N.L.R.B.* v. *Charles H. McCauley Associates, Inc.*, 657 F.2d 685 (5th Cir. 1981).

[14] In this regard we note that in those instances where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are casually related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it was enough to determine events, it is enough to come within the proscription of the Act.

[11] Par. 6(a) of the complaint alleges that in the July 27, 1981, conversation Street unlawfully interrogated and threatened employees. In view of the above credibility resolutions I find that those allegations have not been sustained.

B. *The Discharge of Hollister*

1. The sequence of events

Respondent hired John Hollister as a probationary cabdriver in mid-July 1981. At that time Hollister was French's roommate and Anderson, who hired Hollister, knew that they were living at the same address. French was discharged on July 27, 1981. A few days after the discharge Anderson asked Hollister whether Hollister intended to stay with the Company in the light of French's discharge and the unionization efforts that were going on. Hollister replied that he intended to keep working.[12]

Hollister was active on behalf of the Union. He attended the original meeting at French's house on July 26 and he distributed union literature at the airport on July 30 and on August 5 or 6, 1981. He was observed passing out the literature at the airport on at least one occasion by Supervisor George Lemmons. Anderson acknowledged in his testimony that at the time he spoke to Hollister about whether Hollister was going to continue working, he knew that Hollister was active on behalf of the Union because he had seen Hollister passing out literature.

On August 9, 1981, Hollister had some difficulty with his cab. In turning around in the small parking lot, he backed up too far with the result that the back wheels of the cab rolled off the backside of a curb onto a graveled border area. The bottom of the cab either touched or was near the curb. Because of the gravel, Hollister could not get enough traction to come back over the curb. He called the dispatcher and Road Boss William Perry[13] came to the scene. Hollister gave the cab a push by hand and Perry drove it off the curb without difficulty. Their joint effort to free the cab took about 15 seconds. Hollister inspected the underside of the cab and he did not observe any damage. Perry said, "Have a good day" and left. That incident occurred between 1 and 1:30 p.m. on August 9. At 3:30 p.m. that day Hollister received a call to come to the office. When he arrived there he went into Lemmons' office where he was met by Lemmons and Perry. Lemmons told Hollister that because Hollister had abused the equipment by high-centering[14] his cab during his probationary period, Respondent was going to have to let him go. Hollister explained the details of the incident and said that there had been no damage to the cab. Lemmons replied by telling him he was terminated and that was it. As Hollister was leaving he said that he knew why he was really fired and that he would see them in court. Neither Lemmons nor Perry replied.

Hollister's personnel file contains a memo dated August 9, 1981, signed by Perry which recommends that Hollister be terminated for high-centering the cab. The memo states "I call it reckless driving." The memo has a notation signed by Lemmons which indicates that Hollister was terminated on that date. Lemmons testified that no one else had ever been discharged by Respondent for high-centering a cab but that such an incident had not previously occurred.

Hollister was discharged on July 9, 1981. A day or so later cabdriver Joe Reading spoke to supervisory Road Boss Perry about Hollister's discharge. At the time they had both left the cabs they were driving and were having a conversation on the street. Reading said, "You sure didn't waste any time getting rid of Hollister" and Perry replied, "Yeah, reckless driving. He must have hit that curb pretty hard." Reading then said, "Well, you know, people have done worse and not lost their job." Perry grinned and replied, "Besides, he's one of those union organizers." Reading then said, "Well, you guys take any excuse, won't you?"[15]

2. Analysis and conclusions with regard to the discharge of Hollister and related matters

The *Wright Line* analysis set forth above with relation to the discharge of French applies equally to the discharge of Hollister.

Hollister was engaging in protected activity when he distributed union literature to fellow employees at the airport on July 30 and August 5 or 6, 1981. Anderson acknowledged that he knew that Hollister was active for the Union and had passed out literature. He also knew that Hollister was French's roommate. As found above French was discharged because of his union activity. After French's discharge Anderson asked Hollister whether Hollister intended to stay with the Company and Hollister spoke of French's discharge and the continuing unionization effort. As demonstrated by the unlawful discharge of French, Respondent harbored a virulent animosity against employees who engaged in union activity. Respondent discharged Hollister within a short time of its learning about his union activities. Supervisor Perry was the one who effectively recommended Hollister's termination. Shortly after that termination, when Reading questioned Perry concerning Hollister's discharge for what appeared to be a minor matter, Perry said, "Besides, he's one of those union organizers." That remark constituted an admission by Perry that Hollister's union activity was one of the reasons for the discharge. As with French, the General Counsel has made out a strong *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in Respondent's decision to discharge Hollister.

Respondent has established that Hollister was a recently hired probationary employee and that Hollister backed his cab over a curb onto gravel in such a way that he needed assistance in driving the cab away. Respondent has not shown that there was any damage done to the

[12] This finding is based on the testimony of Hollister. Anderson acknowledged in his testimony that after French was fired he asked Hollister whether Hollister was going to continue working. He denied that there was any reference to French. He averred in substance that he was curious about Hollister because Hollister was actively involved with the Union and he wanted to make sure his schedule would not be interfered with by Hollister taking shorter hours or by Hollister leaving the Company. I credit Hollister over Anderson.

[13] Respondent admits and I find that Perry was a supervisor within the meaning of the Act.

[14] High-centering is a term used when the back wheels of the vehicle are actually off the ground.

[15] Anderson testified that Perry no longer works for Respondent and that he did not know where Perry could be contacted. Perry did not testify, but under these circumstances I am not making any adverse inferences based on that failure to appear as a witness. The above findings are based on the testimony of Reading which I find to be fully credible.

cab. There was no indication that Perry considered it a significant matter at the time the incident occurred. Yet shortly thereafter in his memo to Lemmons, Perry described Hollister's conduct as reckless driving. Not long after Hollister's discharge Perry answered Reading's question about Hollister's discharge by saying that Hollister engaged in reckless driving and had hit the curb pretty hard. Neither of those remarks was accurate and it was apparent that Perry was trying to exaggerate a minor matter into one of major significance. When Reading put the matter into perspective by saying that other people had done worse and not lost their jobs, Perry grinned and said, "Besides, he's one of those union organizers." That remark was tantamount to an admission that Hollister would not have been discharged except for his union activity. Evaluating the evidence as a whole, I find that Respondent has not demonstrated that it would have discharged Hollister even in the absence of his union activity. Respondent has not produced evidence to balance, much less to outweigh, the evidence produced by the General Counsel. I therefore find that by discharging Hollister, Respondent violated Section 8(a)(3) and (1) of the Act.

Perry's remark to Reading that Hollister was one of those union organizers, in the context in which it was made, constituted an admission that one of the reasons Hollister was discharged was his union activity. It also constituted an implied threat to Reading that he or other employees would also be discharged if they engaged in union activity. That remark could reasonably be said to interfere with the free exercise of employee rights under the Act and it therefore constituted a violation of Section 8(a)(1) of the Act. *Truck Stations, Inc., d/b/a Woody's Truck Stops*, 258 NLRB 705 (1981); *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146, 1148 (1980).

The complaint alleges additional independent violations of Section 8(a)(1) which must be considered. Paragraph 6(c)(1) of the complaint alleges that on or about August 23, 1981, Lemmons interrogated an employee concerning union activity. Cabdriver Anthony Castellano testified that on or about August 20 he met with Anderson, Lemmons, and Perry and volunteered to them that he was one of the union representatives. He averred that Lemmons said, "So you joined that flake French"; that Anderson said, "Don't you know he's a flake? They've got a flake file on him down at the Reno Gazette"; and that Anderson also asked him if he knew that French ran for president and was involved in the yellow-ribbon campaign. Anderson in his testimony denied calling French a flake. Though I credit Castellano's version of the conversation, I am unpersuaded that any of the remarks of the supervisors constituted interrogation concerning union activities. Interrogation is a questioning or at the very least a statement that calls for a response. The supervisors' statements to Castellano were neither. They were trying to talk Castellano out of any association with French but there was no meaningful interrogation. If any questions were asked they were merely rhetorical questions that did not call for a reply. I shall therefore recommend that that paragraph of the complaint be dismissed.

Paragraph 6(c)(2) of the complaint alleges that on or about August 26 Lemmons threatened to discharge an employee for union activity. Castellano testified that in his conversation with Anderson, Perry, and Lemmons, Lemmons said that he had heard that French was telling employees that the cab companies could not fire an employee if the employee was involved in the union. According to Castellano, Lemmons waived the Company's rules at him and told him that what French had said was not true and that if the employees broke any of the rules, they were going to get fired. Lemmons in his testimony denied that he threatened to fire Castellano or that he waved the rules at him, and Anderson corroborated that testimony. However I credit Castellano. Nonetheless I am unpersuaded that Lemmons threatened to discharge employees because of their union activity. Lemmons appeared to be concerned with the possibility that employees were being told that if they joined the Union they were immune to discharge for any reason and he was simply telling Castellano that employees would have to follow the rules. I shall therefore recommend that that paragraph of the complaint be dismissed.

Paragraph 7(d) of the complaint alleges that on or about August 19, 1981, Respondent formalized, drafted, and promulgated work rules in retaliation for employees' union activities. There is little evidence in the record with regard to that allegation. Castellano testified that before August 20, 1981, the Company's practice was to post rules on the bulletin board but that on that date all of the rules were put in one document and were distributed to the employees. He averred that there was really nothing new in the rules but it was the first time that he had seen them put together and distributed individually to the drivers. The evidence does not establish that the rules were drafted or promulgated as alleged in the complaint. They had been drafted and promulgated previously and put on the bulletin board. An argument could be made that the dissemination of the rules by handing them to employees rather than posting them on the bulletin board was a formalization of the rules, but such an argument is at best tenuous. There is no allegation that the contents of the rules were unlawful and under the circumstances herein I am unprepared to infer from the timing of the distribution of the rules with relation to the union activity that the change from the posting to the distribution of the rules was intended to or had the tendency to interfere with Section 7 rights. I shall therefore recommend that that allegation of the complaint be dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occuring in connection with the operations of Respondent described in section I, above, have a close, common, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discharged French and Hollister in violation of Section 8(a)(3) and (1) of the Act, I recommend that Respondent be ordered to reinstate and to make them whole for any loss of earnings resulting from their discharges by payment to each of them of a sum of money equal to the amount he normally would have earned as wages, tips, and other benefits from the date of his discharge to the date upon which reinstatement is offered, less net earnings during that period. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner described in *Florida Steel Corporation*, 231 NLRB 651 (1977).[16]

It is further recommended that Respondent be ordered to preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(3) and (1) of the Act by discharging French and Hollister because of their union activities.
4. Respondent violated Section 8(a)(1) of the Act by telling an employee that another employee was discharged because of that other employee's union activity.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. Except as is set forth above, the General Counsel has not established by a preponderance of the credible evidence that Respondent violated the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and upon the entire record of this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[17]

The Respondent, Reno Cab Co., Inc. d/b/a Reno Sparks Cab Co., Reno, Nevada, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee for engaging in activity on behalf of Reno Cab Drivers Independent Association, or any other union.

(b) Telling any employee that another employee was discharged because of that other employee's union activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Jason French and John Hollister full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges and make them whole, with interest, for lost earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(c) Expunge from its files any reference to the July 27, 1981, discharge of Jason French and the August 9, 1981, discharge of John Hollister, and notify them in writing that that has been done and that evidence of those unlawful discharges will not be used as a basis for future personnel action against them.

(d) Post at its Reno, Nevada, place of business copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 32, after being duly signed by its authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that those allegations in the complaint as to which no violations have been found are hereby dismissed.

[16] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[17] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[18] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against any employee for engaging in activity

on behalf of Reno Cab Drivers Independent Association, or any other union.

WE WILL NOT tell any employee that another employee was discharged because of that other employee's union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL offer full reinstatement to Jason French and John Hollister with backpay, plus interest.

WE WILL expunge from our files any reference to the July 27, 1981, discharge of Jason French and the August 9, 1981, discharge of John Hollister, and notify them in writing that that has been done and that evidence of those unlawful discharges will not be used as a basis for future personnel action against them.

RENO CAB CO., INC. D/B/A RENO SPARKS CAB CO.